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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RAMON JOSE DAVIDSON, Appellant.	2 CA-CR 2010-0212 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082637

Honorable Clark W. Munger, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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Tucson
Attorneys for Appellee

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H O W A R D, Chief Judge.

¶1 After a jury trial held in his absence, appellant Ramon Davidson was convicted of burglary and theft by control and sentenced to presumptive, concurrent prison terms, the longer of which was 4.5 years. On appeal, Davidson argues the trial court erred by denying his motion to admit his own prior testimony. Because the trial court did not abuse its discretion, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). An officer, based on a reported vehicle break-in, stopped the vehicle in which Davidson was a passenger. Davidson fit the description of one of the suspects and was identified by a witness and arrested. He was charged with burglary, theft by control, and possession of burglary tools. At his first trial, the court entered a judgment of acquittal as to the possession of burglary tools. Because the jury was unable to reach a verdict on the other two counts, the court declared a mistrial. Davidson's second trial was held in his absence. He was convicted, and a warrant was issued for his arrest. After Davidson was taken into custody, he was sentenced and this appeal followed.

Discussion

¶3 Davidson argues the trial court abused its discretion by denying his motion to admit in evidence his recorded testimony from the prior trial as a hearsay exception under Rule 804(b)(1), Ariz. R. Evid. He reasons that he was unavailable under Rule 804(a)(5), because his counsel could not procure his presence at trial, due in part to his

mental illness and homelessness. We review the court's finding of unavailability for an abuse of discretion. *State v. Rivera*, 226 Ariz. 325, ¶ 12, 247 P.3d 560, 564 (App. 2011).

¶4 Although Davidson alleges mental illness and homelessness as the basis for his absence at trial, no such claim or evidence was presented to the trial court when the former testimony was proffered. Instead, Davidson first raised these arguments in his motion for a new trial. And a trial court may not hear a motion for a new trial more than ten days after the verdict. Ariz. R. Crim. P. 24.1(b), cmt. 24.1(b); *State v. Hill*, 85 Ariz. 49, 54, 330 P.2d 1088, 1090-91 (1958) (former Rule 24.1 "mandatory and must be obeyed by the courts"). Davidson's motion for a new trial was filed after the ten days had expired and was properly denied. Moreover, we review a court's ruling on a motion based on the evidence before it at the time of its ruling. *Cf. State v. Blackman*, 201 Ariz. 527, ¶ 39, 38 P.3d 1192, 1202 (App. 2002) (appeals court reviews denial of motion to sever trials of codefendants "in light of the evidence before the court at the time the motion was made"). Thus, we do not consider any evidence presented to the court for the first time in Davidson's motion for a new trial.

¶5 However, Davidson also argues more generally that his counsel was unable to procure his presence. Rule 804(b)(1) allows the admission of former testimony in criminal proceedings if the declarant is unavailable. The definition of unavailability under Rule 804(a)(5) includes when the declarant "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means." The proponent of the statement must make a good-faith effort to obtain the declarant's presence at trial. *See Rivera*, 226 Ariz. 325, ¶ 13,

247 P.3d at 564. This requires "'an actual showing through competent evidence, sufficient to convince the court that the witness *in fact* cannot be produced.'" *State v. Medina*, 178 Ariz. 570, 575, 875 P.2d 803, 808 (1994) (prosecutor's "unsworn avowals" and one handwritten note insufficient), *quoting State v. Alexander*, 108 Ariz. 556, 562, 503 P.2d 777, 783 (1972).

¶6 A defendant is not unavailable when he seeks to admit his own previous statements while asserting his Fifth Amendment privilege and refusing to testify. *State v. Pandeli*, 200 Ariz. 365, ¶ 23, 26 P.3d 1136, 1144 (2001), *vacated in part on other grounds*, *Pandeli v. Arizona*, 536 U.S. 953 (2002), *supp. op.*, 204 Ariz. 569, ¶ 2, 65 P.3d 950, 951-52 (2003) (stating U.S. Supreme Court decision did not "affect [court's] original opinion with respect to factual, procedural, and guilt issues"). In *Pandeli*, our supreme court reasoned that such a "[d]efendant is not 'unavailable' to himself and has the ability and the right to testify." *Id.*

¶7 Here, the only information before the trial court while it was considering Davidson's motion was counsel's unsworn statement that she had tried to find Davidson. This does not constitute evidence of a good-faith effort to obtain the declarant's presence. *See Medina*, 178 Ariz. at 575, 875 P.2d at 808. More importantly, Davidson, not his counsel, was the proponent of the testimony. Davidson had the right to attend his trial and the right to testify. He was not unavailable to himself, and no timely-submitted evidence suggested he was unable to testify. Thus, the court correctly found Davidson was not unavailable. *See Pandeli*, 200 Ariz. 365, ¶ 23, 26 P.3d at 1144; *see also Garcia-Martinez v. City & County of Denver*, 392 F.3d 1187, 1190-93 (10th Cir. 2004)

(defendant not unavailable when ordered deported, voluntarily left country, but no evidence "alternative options for testifying had been exhausted").

¶8 Davidson seems to contend the trial court should have known he "had mental health problems" and sua sponte found him unavailable on that basis. However, Davidson cites no authority supporting this argument, and the burden is on the proponent of the testimony to show unavailability. *See Medina*, 178 Ariz. at 575, 875 P.2d at 808. We cannot find the court erred in concluding Davidson had not met his burden of demonstrating unavailability.

¶9 Davidson further argues the denial of his motion to admit his prior testimony violated his constitutional rights to due process and to confrontation by denying him "a meaningful opportunity to present a complete defense." We review the constitutionality of the court's decision de novo. *State v. Dann*, 220 Ariz. 351, ¶ 27, 207 P.3d 604, 613 (2009).

¶10 To preserve an argument for review, the defendant must make sufficient argument to allow the trial court to rule on the issue. *State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) ("objection is sufficiently made if it provides the judge with an opportunity to provide a remedy"). "And an objection on one ground does not preserve the issue [for appeal] on another ground." *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008). Although Davidson's counsel mentioned his "constitutional right" generally, she did not specify which constitutional right, but rather focused on whether his testimony could be admitted under the rules of evidence. Davidson therefore has forfeited the right to seek relief for all but fundamental,

prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Fundamental error requires the defendant to establish that: (1) an error occurred; (2) the error was fundamental; and (3) the error resulted in prejudice. *See id*.

¶11 The Confrontation Clause of the United States Constitution and article II, § 24 of the Arizona Constitution guarantee a defendant's right to confront "the witnesses against him." U.S. Const. amend. VI; Ariz. Const. art. II, § 24. Davidson's situation is inapposite. He argued for the admission of his own testimony, rather than for the ability to confront an adverse witness. Thus, no error occurred.

¶12 "Due process requires that the defendant receive 'a meaningful opportunity to present a complete defense.'" *State v. Connor*, 215 Ariz. 553, ¶ 12, 161 P.3d 596, 601 (App. 2007), *quoting Holmes v. South Carolina*, 547 U.S. 319, 320 (2006). But, the right to present a complete defense "is subject to evidentiary rules." *State v. Abdi*, 226 Ariz. 361, ¶ 32, 248 P.3d 209, 216 (App. 2011). Arizona courts have held that as long as the requirements of Rule 804 are not applied mechanistically, they do not violate a defendant's right to due process. *State v. Machado*, 224 Ariz. 343, ¶ 40, 230 P.3d 1158, 1173 (App. 2010).

¶13 The trial court here had no information on Davidson's unavailability, other than defense counsel's statement. The court's application of Rule 804 was reasonably based on the information before it and was not a mechanistic application of the rule. *Cf. Abdi*, 226 Ariz. 361, ¶ 30, 248 P.3d at 216 (reasonable conclusion that evidence cumulative not abuse of discretion). Thus, the court's ruling did not violate Davidson's due process rights.

¶14 Finally, Davidson contends the trial court should have applied the "mercy rule" from *Celaya v. Stewart*, 691 F. Supp. 2d 1046 (D. Ariz. 2010). But, "[t]he so-called 'mercy rule' permits a criminal defendant to introduce evidence of pertinent character traits of the victim." *Celaya*, 691 F. Supp. 2d at 1056 n.2. This rule is inapplicable to Davidson's argument, and the court's failure to apply it does not constitute fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

Conclusion

¶15 For the foregoing reasons, we affirm Davidson's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge